

## Internal Revenue Service

Department of the Treasury  
Washington, DC 20224

Number: **201140012**

Release Date: 10/7/2011

Index Number: 851.01-00, 855.00-00

Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:FIP:03

PLR-113122-11

Date:

June 27, 2011

### Legend

Trust =

Fund =

State X =

Administrator =

Taxable Year =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

a =

b =

Dear \_\_\_\_\_ :

This responds to your request dated March 24, 2011, submitted by the Trust on behalf of the Fund. The Fund requests that the Internal Revenue Service rule that an extension of time under section 301.9100-3 of the Procedure and Administration Regulations be given to the Fund to make elections under sections 851(b)(1) and 855(a) of the Internal Revenue Code for the Taxable Year.

### **Facts**

The Trust, a State X trust, is registered as a management company under the Investment Company Act of 1940, 15 U.S.C. 80a-1 et seq., as amended. The Fund is a portfolio of assets of the Trust and a “fund” as defined in section 851(g)(2). The Fund represents that it satisfied the requirements of section 851(b)(2) and (3) for qualifying as a regulated investment company (RIC) for the Taxable Year. The Fund uses an accrual method of accounting and its taxable year ends on Date 1.

The Trust has engaged the Administrator to administer the Fund. In advance of the Date 2 deadline for filing the Fund’s initial federal income tax return for the Taxable Year, the Administrator prepared for mailing to the Internal Revenue Service a Form 7004, Application for Automatic Extension of Time to File Certain Business Income tax, Information and Other Returns (“Application”). Prior to the deadline, a member of the Administrator’s staff examined the Application and sent it to another staff member, responsible for mailing it to the Service, who neglected to timely mail the Application.

On Date 3, after discovering that the deadline for filing the Application had been missed, the Administrator’s staff member filed the Application. On Date 4, the Fund received a notice from the Service that the Application had been rejected because it was filed after the date the Fund’s return was due. On Date 5, the Fund filed its tax return, for which it used Form 1120-RIC (“Return”). Because of the failure to timely file the Application, however, the filing of the Return resulted in the Fund’s not timely making its election under section 851(b)(1) to be a RIC beginning with the Taxable Year.

After the end of the Taxable year, the Fund paid \$a of ordinary dividends and \$b of capital gain dividends (“Spillover Dividends”) that it elected in the Return to treat as paid during the Taxable Year under section 855(a). These Spillover Dividends were declared and paid before the due date for the Return for the Taxable Year.

The Fund has made the following additional representations:

1. The request for relief was filed by the Fund before the failure to make the regulatory election was discovered by the IRS.

2. Granting the relief will not result in the Fund having a lower tax liability in the aggregate for all years to which the regulatory election applies than the Fund would have had if the election had been made timely (taking into account the time value of money).
3. The Fund did not seek to alter a return position for which an accuracy-related penalty has been or could have been imposed under section 6662 of the Code at the time it requested relief and the new position requires or permits a regulatory election for which relief is requested.
4. Being fully informed of the required regulatory election and related tax consequences, the Fund did not choose to not file the election

## Law and Analysis

Section 851(b)(1) provides that a corporation shall not be considered a RIC for any taxable year unless it files with its return for the taxable year an election to be a RIC or has made such election for a previous taxable year.

Section 1.851-2(a) of the Income Tax Regulations provides that the election mentioned in section 851(b)(1) “shall be made by the taxpayer by computing taxable income as a RIC in its return for the first taxable year for which the election is applicable. No other method of making such election is permitted.”

Section 855(a) as in effect for the Taxable Year provides, in part, that if a RIC declares a dividend prior to the time prescribed by law for the filing of its return for a tax year (including the period of any extension of time granted for filing such return), and distributes the amount of the dividend to shareholders in the 12-month period following the close of such tax year and not later than the date of the first regular dividend payment made after the declaration, the amount so declared and distributed shall, to the extent the RIC elects in such return in accordance with regulations prescribed by the Secretary, be considered as having been paid during such taxable year, except as provided otherwise by section 855.

Section 1.855-1(b)(1) provides that a section 855(a) election must be made in the return filed by the RIC for the taxable year. The election shall be made by the taxpayer by treating the dividend (or portion thereof) to which such election applies as a dividend paid during the taxable year in computing its investment company taxable income, or if the dividend (or portion thereof) to which such election applies is to be designated by the company as a capital gain dividend, in computing the amount of capital gain dividends paid during such taxable year.

Section 301.9100-1(c) of the Procedure and Administration Regulations provides, in part, that the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election (defined in § 301.9100-1(b) as an election whose due date is prescribed by regulations or by a revenue ruling, a revenue procedure, a notice, or an announcement published in the Internal Revenue Bulletin), or a statutory election (but no more than 6 months except in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I.

Sections 301.9100-3(a) through (c)(1)(i) set forth rules that the Internal Revenue Service generally will use to determine whether, under the facts and circumstances of each situation, the Commissioner will grant an extension of time for regulatory elections that do not meet the requirements of § 301.9100-2. Section 301.9100-3(b) provides that subject to paragraphs (b)(3)(i) through (iii) of § 301.9100-3, when a taxpayer applies for relief under this section before the failure to make the regulatory election is discovered by the Service, the taxpayer will be deemed to have acted reasonably and in good faith; and § 301.9100-3(c) provides that the interests of the government are prejudiced if granting relief would result in the taxpayer having a lower tax liability in the aggregate for all years to which the regulatory election applies than the taxpayer would have had if the election had been timely made (taking into account the time value of money.)

## **Conclusion**

Based on the facts and representations submitted, we conclude that the requirements are satisfied for granting the Fund a reasonable extension of time to make the election under section 851(b)(1) of the Code to be a RIC for the Taxable Year and to make an election under section 855(a) to treat dividends paid after the end of the Taxable Year as having been paid during the Taxable Year. Accordingly, an extension of time to make the elections under sections 851(b)(1) and 855(a) is granted, and the Fund's elections described above made on the Form 1120-RIC filed on Date 3 for the Taxable Year will be treated as having been timely made.

This ruling is limited to the timeliness of making the elections under sections 851(b)(1) and 855(a). Except as specifically ruled upon herein, we express no opinion concerning any federal excise or income tax consequences relating to the facts herein under any other section of the Code. For example, we express no opinion as to whether the Fund has satisfied all of the requirements of sections 851(b)(1) and 855(a) and the regulations thereunder. We also express no opinion as to whether the Fund qualifies as a RIC under subchapter M, part I, of chapter 1 of the Code.

Further, no opinion is expressed as to whether the Fund's tax liability is not lower in the aggregate for the year to which the regulatory election applies than the Fund's tax liability would have been if the election had been timely made (taking into account the

time value of money). Upon audit of the federal income tax return involved, the district director's office will determine the Fund's tax liabilities for the years involved. If the district director's office determines any of the Fund's liabilities are lower, that office will determine the federal income tax effect.

The ruling contained in this letter is based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to the Fund's authorized representative.

Sincerely,

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Alice M. Bennett  
Branch Chief, Branch 3  
Office of Associate Chief Counsel  
(Financial Institutions & Products)

cc: